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### Is Anybody Home? The Relaxation of the Residency Requirement for Claiming a Qualifying Child Under the Earned Income Tax Credit After *Rowe v. Commissioner*

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# IS ANYBODY HOME? THE RELAXATION OF THE RESIDENCY REQUIREMENT FOR CLAIMING A QUALIFYING CHILD UNDER THE EARNED INCOME TAX CREDIT AFTER *ROWE V. COMMISSIONER*

*Jennifer S. Hamel*

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## IS ANYBODY HOME? THE RELAXATION OF THE RESIDENCY REQUIREMENT FOR CLAIMING A QUALIFYING CHILD UNDER THE EARNED INCOME TAX CREDIT AFTER *ROWE V. COMMISSIONER*

Jennifer S. Hamel\*

### I. INTRODUCTION

Cynthia Rowe is currently serving a life sentence in prison for the shooting death of her brother-in-law. While she may have lost her criminal case, at least Rowe came away victorious in the recent Tax Court decision, *Rowe v. Commissioner*,<sup>1</sup> in which she was awarded the earned income tax credit (EITC) over the objection of the Internal Revenue Service (Service or IRS). Unfortunately, her victory comes at the expense of sound legal analysis and public policy. Despite the efforts of Congress to ensure that the benefit of the EITC is given only to those who need it most by imposing strict statutory requirements for its receipt, Rowe was successful in obtaining that benefit without having to meet those requirements through a misunderstood and ill-guarded loophole in the Treasury Regulations.<sup>2</sup>

This Note begins by discussing the statutory requirements for claiming the maximum EITC, which is available if a taxpayer has more than two “qualifying children” in his or her household.<sup>3</sup> One of these requirements, the residency requirement, is notorious for perplexing taxpayers and commentators alike. This Note explores the difficulties that can arise in applying the residency requirement to complicated family dynamics, leading to increased efforts by the Service to target EITC noncompliance. Despite these efforts to ensure strict adherence to the residency requirement, taxpayers may still avoid the requirement through an exception found in the Treasury Regulations, if the failure to meet the requirement was the result of a “temporary absence due to special circumstances.”<sup>4</sup> As this Note will argue, the current interpretation of this exception has been distorted by both the Service and the Tax Court, most recently in the *Rowe v. Commissioner* decision, to allow a taxpayer to claim the exception without having to offer any evidence to establish that the exception is warranted. The current standard for applying the temporary absence exception—that a taxpayer need only show intent to return to the child’s home—may be satisfied with self-serving testimony, which dilutes the efficacy of the residency requirement in targeting the EITC to its proper and deserving recipients.

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1. 128 T.C. 13 (2007).

2. Treas. Reg. § 1.2-2(c)(1) (2007).

3. See *infra* Part II.B.

4. Treas. Reg. § 1.2-2(c)(1) (2007).

## II. BACKGROUND

### A. The Earned Income Tax Credit

The EITC is a refundable credit that is available to households with earnings from “wages, salaries, tips, and other employee compensation . . . includible in gross income for the taxable year” or “net earnings from self-employment for the taxable year.”<sup>5</sup> Taxpayers who are married and filing jointly, or a taxpayer who is single or a head-of-household, may claim the EITC.<sup>6</sup> The amount of the EITC is determined according to a complex statutory formula which takes into account the taxpayer’s earned income and the number of qualifying children in the taxpayer’s household, although qualifying children are not a prerequisite to receiving the EITC.<sup>7</sup> The EITC phases out once the taxpayer’s earned income reaches a certain level, and a taxpayer becomes ineligible for the EITC if she has excessive “disqualified income,” or income from interest, dividends, or capital gains.<sup>8</sup> The earned income and disqualified income amounts are adjusted yearly for inflation.<sup>9</sup>

### B. What is a “Qualifying Child”?

Although a childless taxpayer may receive the EITC, the maximum credit will be applied when the taxpayer has at least two qualifying children.<sup>10</sup> Therefore, it is important to understand the meaning of the term, “qualifying child.” Prior to 2004, the definition of “qualifying child” for the purposes of the EITC was located in § 32(c)(3).<sup>11</sup> As several other Code provisions also involved the term “qualifying child,” including the provisions that determined eligibility for head-of-household status,<sup>12</sup> the dependent care credit,<sup>13</sup> the child credit,<sup>14</sup> and the dependency exemption,<sup>15</sup> taxpayers had to qualify separately under the requirements of each Code section. In 2002, the Department of Treasury reported a high incidence of erroneous claims by taxpayers who, due to differing requirements, qualified for one child-related tax benefit but not another, and proposed a uniform definition of a qualifying child “to reduce both

5. I.R.C. § 32(c)(2)(A) (2006). Income earned while a taxpayer is incarcerated is not taken into account for the purposes of determining the EITC. *See id.* § 32(c)(2)(B)(iv) (2006).

6. Taxpayers who are married but file separately may not claim the EITC. I.R.C. § 32(d) (2006).

7. *See id.* § 32(c)(1) (2006) (defining “eligible individual”). The EITC is calculated as follows:

The amount of the credit allowable to a taxpayer . . . for any taxable year shall not exceed the excess (if any) of —

(A) the credit percentage of the earned income amount, over  
(B) the phaseout percentage of so much of the adjusted gross income (or, if greater, the earned income) of the taxpayer for the taxable year as exceeds the phaseout amount.

I.R.C. § 32(a)(2) (2006). The credit and phaseout percentages are highest for individuals with two or more qualifying children and lowest for individuals with no qualifying children. *See id.* § 32(b)(1)(A) (2006).

8. *See id.* § 32(i) (2006).

9. *See id.* § 32(j) (2006).

10. *See supra* note 7 and accompanying text.

11. I.R.C. § 32(c)(3) (2000), amended by I.R.C. § 32(c)(3) (Supp. V 2005).

12. I.R.C. § 2(b) (2000), amended by I.R.C. § 2(b) (Supp. V 2005).

13. *See id.* § 21 (2000), amended by I.R.C. § 21 (Supp. V 2005).

14. *See id.* § 24 (2000), amended by I.R.C. § 24 (Supp. V 2005).

15. *See id.* § 152 (2000), amended by I.R.C. § 152 (Supp. V 2005).

compliance and administrative burdens,” as well as the rate of erroneous claims.<sup>16</sup> Congress took heed in 2004, when as part of the Working Families Tax Relief Act of 2004, it set forth a “Uniform Definition of Child” to be located in § 152, the section containing the provisions for eligibility for the dependency exemption.<sup>17</sup> Section 32(c)(3) now makes reference to § 152(c) for the definition of “qualifying child” for the purposes of the EITC.<sup>18</sup>

Both § 152(c) and the old § 32(c)(3) contain three basic tests for determining whether an individual could be considered a “qualifying child” of a taxpayer: a relationship test, an age test, and a residency test. First, the individual must be a taxpayer’s child (or descendant of such child), brother, sister, stepbrother, or stepsister (or descendant of such relative).<sup>19</sup> Second, the individual must be under the age of nineteen (or twenty-four if a student) as of the end of the calendar year in which the taxable year of the taxpayer begins, unless the individual is permanently disabled, in which case the age test is automatically satisfied.<sup>20</sup> Third, the individual must have “the same principal place of abode as the taxpayer for more than one-half of [the] taxable year.”<sup>21</sup> The current § 32(c)(3) imposes additional provisions that prohibit a taxpayer from claiming a married individual as a qualifying child,<sup>22</sup> and require a taxpayer to include the name, age, and Tax Identification Number (TIN) of each qualifying child on his or her tax return.<sup>23</sup>

A difficult situation may arise when more than one taxpayer is able (under the three tests) to claim the same child for the purposes of the EITC. Because an individual may be claimed as a qualifying child only once, § 152(c)(4) sets forth some tie-breaking rules in order to determine who may properly claim a child. Sometimes, the situation is resolved fairly simply. For example, when the contest is between a parent of the child and someone who is not a parent, the parent may take the credit.<sup>24</sup> Additionally, when the contest is between two non-parent taxpayers, the taxpayer with

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16. DEP’T OF TREASURY, PROPOSAL FOR UNIFORM DEFINITION OF A QUALIFYING CHILD 7 (2002), <http://www.treas.gov/press/releases/docs/child.pdf>.

17. Working Families Tax Relief Act of 2004, Pub. L. No. 108-311, § 201, 118 Stat. 1166, 1169-75.

18. See I.R.C. § 32(c)(3)(A) (2006) (“The term ‘qualifying child’ means a qualifying child of the taxpayer (as defined in § 152(c), determined without regard to paragraph (1)(D) thereof and section 152(e)).”). Paragraph (1)(D) of § 152(c) provides an additional requirement that a “qualifying child” could not have provided more than half of his or her own support for the taxable year. See *id.* § 152(c)(1)(D) (2006).

19. See *id.* § 152(c)(2) (2006). An eligible foster child or an adopted child is also considered a “child” for the purposes of the relationship test. See *id.* § 152(f)(1) (2006). The former § 32(c)(3) included eligible foster children and adopted children for the purposes of the relationship test as well. See *id.* § 32(c)(3)(B) (2000 & Supp. III 2003), amended by I.R.C. § 32(c)(3)(A) (Supp. V 2005).

20. See *id.* § 152(c)(3)(A)-(B) (2006). The former § 32(c)(3) contained virtually the same age test. See *id.* § 32(c)(3)(C) (2000), amended by I.R.C. § 32(c)(3)(A) (Supp. V 2005).

21. See *id.* § 152(c)(1)(B) (2006). The former § 32(c)(3) contained virtually the same residency test, with the additional requirement that the principal place of abode be in the United States. See *id.* § 32(c)(3)(E) (2000 & Supp. III 2003), amended by I.R.C. § 32(c)(3)(C) (Supp. V 2005). The current § 32(c)(3) also contains this additional requirement. See *id.* § 32(c)(3)(C) (2006).

22. See *id.* § 32(c)(3)(B) (2006).

23. See *id.* § 32(c)(3)(D) (2006).

24. See *id.* § 152(c)(4)(A)(i) (2006). The former § 32(c)(1)(C) contained virtually identical language as current § 152(c)(4). See *id.* § 32(c)(1)(C) (Supp. III 2003) (repealed 2004).

the highest adjusted gross income for the taxable year may take the credit.<sup>25</sup> However, when the contest is between two parents who do not file a joint return together, the situation can become more complicated. If both parents claim the same child for the purposes of the EITC, the credit properly goes either to the parent with whom the child resided for the longest period of time during the year, or, if the child resides with both parents for an equal amount of time during the year, to the parent with the highest adjusted gross income.<sup>26</sup>

### C. EITC Noncompliance and the Residency Requirement

Although the EITC has been touted as one of the most successful government antipoverty programs in recent years in its aim to supplement the earnings of low-income, working households,<sup>27</sup> the program is not without flaws. A recent study of tax returns from the taxable year 1999 revealed that between twenty-seven percent and thirty-two percent of EITC claims were erroneously paid.<sup>28</sup> In 2003, the Service estimated that \$3 billion in improper payments resulted from errors associated with the qualifying child requirements, with “the vast majority” of errors having to do with the residency requirement.<sup>29</sup> The Service attributed the high noncompliance rate to the fact that the EITC is a social benefits program which, unlike traditional welfare programs, relies on self-reporting rather than requiring proof of eligibility prior to payment.<sup>30</sup> However, many commentators point to the complexity of the EITC requirements and the limited resources of low-income taxpayers to access professional tax advice as the sources of noncompliance.<sup>31</sup>

Some scholars have noted that the residency requirement creates a “structural incentive” to misstate the amount of time that a child spends with a taxpayer.<sup>32</sup> Professor Leslie Book, applying her experience working in a legal clinic with low-income taxpayers, argues that the current EITC eligibility rules, particularly the residency requirement, may not reflect a non-custodial parent’s connection to his or her

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25. See *id.* § 152(c)(4)(A)(ii) (2006).

26. See *id.* § 152(c)(4)(B) (2006).

27. See SAUL D. HOFFMAN & LAURENCE S. SEIDMAN, *HELPING WORKING FAMILIES: THE EARNED INCOME TAX CREDIT 1-8* (2003) (describing the success of the EITC across party lines as an incentive to work and an alternative to an increased minimum wage).

28. I.R.S. Fact Sheet 2003-14 (June 2003), <http://www.irs.gov/newsroom/article/0,,id=110296,00.html>.

29. *Id.*

30. *Id.* However, the Service also acknowledged the difficulty of confirming facts related to the qualifying child requirements in an administratively feasible manner. *Id.*; see also I.R.S. Announcement 2003-40, 2003-1 C.B. 1132 (“[T]he IRS conducts examinations to verify the eligibility of individuals with questionable claims. Despite these and other efforts, the IRS has been unable to significantly reduce the noncompliance rate over the years.”).

31. See, e.g., Leslie Book, *The IRS’s EITC Compliance Regime: Taxpayers Caught in the Net*, 81 OR. L. REV. 351, 353 (2002); George K. Yin, John Karl Scholz, Jonathan Barry Forman & Mark J. Mazur, *Improving the Delivery of Benefits to the Working Poor: Proposals to Reform the Earned Income Tax Credit Program*, 11 AM. J. TAX POL’Y 225, 254-55 (1994). For an interesting overview of noncompliance among low-income taxpayers in general, see Leslie Book, *The Poor and Tax Compliance: One Size Does Not Fit All*, 51 U. KAN. L. REV. 1145 (2003).

32. Leslie Book, *Freakonomics and the Tax Gap: An Applied Perspective*, 56 AM. U. L. REV. 1162, 1171 (2006-2007) (“[T]he current structure of the EITC presents structural incentives to certain classes of taxpayers willing to misstate eligibility for the EITC or facilitate others’ misstatements.”).

child.<sup>33</sup> As a result, “[t]his frustration with the EITC eligibility rules . . . contributes to symbolic non-compliance in effect, intentional non-compliance that taxpayers commit to address perceived injustices in the system.”<sup>34</sup> Others argue that most errors are not so much related to civil disobedience, but rather are the result of innocent mistakes regarding modern custody arrangements.<sup>35</sup> Saul D. Hoffman and Laurence S. Seidman note: “If a child spends substantial time residing with each of two separated parents (as is often the case), each parent may be inclined to believe that child resides with him or her ‘roughly half’ the time; hence, each files for the EITC.”<sup>36</sup> On the flip side of Hoffman and Seidman’s view, the Center on Budget and Policy Priorities (the Center) places the blame for these mistakes on the complexity of the EITC requirements, reasoning:

The complexity of the EITC results in significant part from efforts by Congress to target the EITC carefully to intended recipients in order to minimize the budgetary cost and increase the effectiveness of the program. Overpayments often result from the interaction between the complexity of the EITC rules and the complexity of families’ lives.<sup>37</sup>

The Center also argues that the Service exaggerated the error rate for the EITC, claiming instead that the noncompliance rate for the EITC was actually lower than noncompliance rates in other parts of the Code.<sup>38</sup>

Whatever the reason behind the noncompliance rate in EITC claims, in 2003, the Service decided to take action by instituting a pilot certification program targeted towards reducing errors related to the relationship and residency requirements.<sup>39</sup> Under the program, certain “higher risk claimants” were required to provide documentation to verify that the child(ren) claimed under the EITC actually resided with the claimant for more than half of the year.<sup>40</sup> Such documentation could include third-

33. *Id.* at 1176. As an example, Professor Book mentions a client who spent three days per week with his children and “was the children’s principal provider of material support,” yet was denied the EITC because he was not the “custodial parent.” *Id.* at 1178. *Cf.* C. Garrison Lepow, *The Flimflam Father: Deconstructing Parent-Child Stereotypes in Federal Tax Subsidies*, 5 N.Y.U. J. LEGIS. & PUB. POL’Y 129 (2001) (criticizing the disconnect between the dependency exemption provisions and the division of childcare responsibilities between divorced parents).

34. Book, *supra* note 32, at 1176.

35. See HOFFMAN & SEIDMAN, *supra* note 27, at 142-45.

36. *Id.* The authors also admit: “Of course, if a parent claims a child who seldom resides with him, the error is probably intentional.” *Id.*

37. NICHOLAS JOHNSON ET AL., CTR. ON BUDGET AND POLICY PRIORITIES, STATE EARNED INCOME TAX CREDITS AND THE “OVERPAYMENTS” ISSUE 2, at 2 (2007), <http://www.cbpp.org/3-28-07sfip.pdf>.

38. *Id.* at 3-4. Citing a 2001 IRS “tax gap” study, the Center notes that “[t]he total cost to the federal government from . . . misreporting of business income—estimated at \$109 billion—is at least *ten to twelve times* the size of total EITC overpayments.” *Id.* (citation omitted).

39. I.R.S. Fact Sheet 2003-14, *supra* note 28.

40. *Id.* The Service did not define “higher risk claimants,” but noted that mothers and married, joint-filing parents would be exempt from the certification program. *Id.*

The EITC certification program has generated significant commentary, particularly because of the burden it imposed on low-income taxpayers. In his article comparing the enforcement of EITC with enforcement of welfare programs such as food stamps and Temporary Assistance for Needy Families, Professor Zelenak summarizes the unique position of the EITC in the Tax Code:

party affidavits or other official documents showing that the claimant resided with the claimed child for more than half the year.<sup>41</sup> The Service operated the certification program for the taxable years 2004, 2005, and 2006, and concluded that the program indeed resulted in fewer erroneous EITC claims.<sup>42</sup> The Service's final report to Congress suggested that the certification program "increased voluntary compliance through better understanding of the residency requirement or deterrence of erroneous claims from ineligible claimants."<sup>43</sup> However, the report also acknowledged the possibility that "eligible taxpayers who should have claimed the EITC . . . were deterred by the certification requirement."<sup>44</sup> The certification program was discontinued after 2006, and the Service has expressed no intention to resurrect it.<sup>45</sup>

#### *D. The "Temporary Absence" Exception to the Residency Requirement*

##### *1. The Operation of the Exception and its Application to the EITC*

Despite the Service's diligent efforts to curtail noncompliance with respect to the residency requirement of the EITC, claimants may nevertheless avoid the hard-line residency test through an exception offered in the Treasury Regulations. The regulations under § 2(b), which provide guidance in determining head-of-household status, provide that the residency test is satisfied even if the taxpayer has not shared the same residence as the qualifying child for more than half the year as a result of "temporary absences from the household due to special circumstances."<sup>46</sup> The regulation defines such absences as follows:

A nonpermanent failure to occupy the common abode by reason of illness, education, business, vacation, military service, or a custody agreement under which a child or stepchild is absent for less than 6 months in the taxable year of the taxpayer, shall be considered temporary absences due to special circumstances.<sup>47</sup>

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The controversy over EITC precertification—and over the appropriate level of EITC compliance and enforcement efforts more generally—is a consequence of the EITC's status as a hybrid tax-transfer program. When the EITC is compared with other tax benefits, as to which self-declared eligibility is the norm, even considering a precertification regime for the EITC seems to reflect discrimination against the working poor. When the EITC is compared with other welfare-type transfer programs, however, it is surprising—almost shocking—that the government is willing to send checks for thousands of dollars to EITC claimants simply on their say-so, without any bureaucratic confirmation of eligibility.

Lawrence Zelenak, *Tax or Welfare? The Administration of the Earned Income Tax Credit*, 52 UCLA L. REV. 1867, 1873 (2005). See also James L. Rockney, Note, *Prove It or Lose It: The Certification Program for Select Individuals Claiming the Earned Income Tax Credit*, 2 PITT. TAX REV. 49 (2004).

41. See I.R.S. Form 8836: Qualifying Children Residency Statement (2003), <http://www.irs.gov/pub/irs-prior/f8836-2003.pdf>; see also Rockney, *supra* note 40, at 56.

42. INTERNAL REVENUE SERV., DEP'T OF TREASURY, IRS EARNED INCOME TAX CREDIT (EITC) INITIATIVE, FINAL REPORT TO CONGRESS ii (2005).

43. *Id.*

44. *Id.*

45. INTERNAL REVENUE SERV., EARNED INCOME TAX CREDIT CERTIFICATION TEST (2007) <http://www.irs.gov/individuals/article/0,,id=118200,00.html>.

46. Treas. Reg. § 1.2-2(c)(1) (2007).

47. See *id.* The regulations under the dependency exemption also contain the temporary absences exception. See *id.* § 1.152-1(b).



Furthermore, a temporary absence will not affect a taxpayer's eligibility for head-of-household status if "it is reasonable to assume that the taxpayer or such other person will return to the household."<sup>48</sup>

The regulations under § 32 do not provide for a temporary absence exception,<sup>49</sup> however, both the Service and Congress have issued guidance in which the temporary absence exception is applied for purposes of determining eligibility for the EITC. In Service Center Advisory 200002043, the Service looked to regulations under an earlier version of § 32 which "specifically provide[d] that the term 'principal place of abode' is defined with reference to § 1.2-2(c) of the regulations."<sup>50</sup> Therefore, the Service maintained, "the standards in § 1.2-2(c) are controlling" in determining whether the residency requirement is met for the purposes of the EITC.<sup>51</sup> Additionally, in the conference reports regarding the Omnibus Budget Reconciliation Act of 1990, which, among other things, added the "qualifying child" requirements to the EITC,<sup>52</sup> the House of Representatives acknowledged: "It is intended that the determination of whether the residency requirement is met is made under rules similar to those applicable with respect to whether an individual meets the requirements for head-of-household filing status."<sup>53</sup>

48. *See id.* § 1.2-2(c)(1). The taxpayer must also "continue[] to maintain such household or a substantially equivalent household in anticipation of such return." *Id.* It should be noted that the residency requirement for head-of-household status differs slightly from the residency requirement for EITC eligibility. In order to qualify for head-of-household status, § 2(b) also requires that a taxpayer "maintains as his home a household which constitutes for more than one-half of such taxable year the principal place of abode, as a member of such household, of . . . a qualifying child . . . ." I.R.C. § 2(b)(1)(A) (2006). In order to qualify for the EITC, a taxpayer need not maintain the household of the qualifying child—she need only share "the same principal place of abode" as the qualifying child. *See id.* § 152(c)(1)(B) (2006) (defining "qualifying child" for purpose of EITC); *see also* H.R. REP. NO. 108-696, at 50 (2004) (Conf. Rep.), *as reprinted in* 2004 U.S.C.C.A.N. 1029, 1054 ("Under the earned income credit, there is no requirement that the taxpayer maintain the household in which the taxpayer and the qualifying individual reside."). The requirement that the taxpayer provide over half of an individual's support in order to claim that individual as a qualifying child was removed in 1990. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 1111(a), 104 Stat. 1388, 1388-410 to 1388-411.

49. *See generally* Treas. Reg. § 1.32-2 (2007).

50. I.R.S. Serv. Ctr. Adv. 200002043 (Jan. 14, 2000).

51. *Id.*

52. Omnibus Budget Reconciliation Act of 1990, § 1111(a). In his book, *Contemporary U.S. Tax Policy*, C. Eugene Steuerle outlines the 1990 Budget Act's numerous tax relief provisions targeting low income individuals and families, noting that "[a]ll these child-related bells and whistles were relatively uncoordinated, further complicating the taxation of low-income individuals." C. EUGENE STEURLE, *CONTEMPORARY U.S. TAX POLICY* 159-60 (2004).

53. H.R. REP. NO. 101-964, at 1037 (1990) (Conf. Rep.), *as reprinted in* 1991-2 C.B. 560, 564. The report stated:

Under the House bill, in order to qualify for the EITC, the taxpayer must meet the present-law earned income and adjusted gross income thresholds (as modified by the bill). In addition, the taxpayer must have a "qualifying child." In order to be a qualifying child, an individual must satisfy a relationship test, a residency test, and an age test. . . . An individual satisfies the residency test if the individual has the same principal place of abode as the taxpayer for more than half the taxable year (the entire year for foster children). *It is intended that the determination of whether the residency requirement is met is made under rules similar to those applicable with respect to whether an individual meets the requirements for head-of-household filing status.* Thus, for example, certain temporary

## 2. Judicial Interpretation of the Temporary Absence Exception

The Tax Court has struggled with the proper application of the temporary absence exception as laid out by the head-of-household regulations, and instead has attempted to create its own workable doctrine that it feels best carries out the intent of Congress. The leading case is *Hein v. Commissioner*.<sup>54</sup> In that case, the taxpayer, Hein, claimed his elderly sister as a dependent and claimed head-of-household status, even though his sister was confined to a mental institution with “little, if any, chance of recovering.”<sup>55</sup> Hein argued that the residency test under the head-of-household was satisfied under the temporary absence exception.<sup>56</sup> The Service disallowed head-of-household status to Hein because he had not established that his sister’s absence from his household was temporary and that he was maintaining the household in anticipation of her return.<sup>57</sup> As this was a case of first impression, the Tax Court began by considering the legislative history of the head-of-household rules, then located in § 12(c), noting that:

[T]he committee reports . . . have made it abundantly clear that the benefits of [head-of-household status] are not to be denied, where the dependent is absent because of special circumstances, such as attendance at school or for reasons of health, that do not permanently sever his ties to the home “as a member of such household.”<sup>58</sup>

The court was unsatisfied with the tests provided under the regulations, including the reasonable-assumption-of-return test which was put forward by the Service as the basis for denying Hein’s claim.<sup>59</sup> Instead, the court found the appropriate test under the fact and circumstances to be whether or not Hein or his sister intended for her confinement

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absences due to education or illness are disregarded for purposes of determining whether the child had the same principal place of abode as the taxpayer for half the year.

*Id.* (emphasis added).

54. 28 T.C. 826 (1957), *acq.*, 1958-2 C.B. 3.

55. *Id.* at 828.

56. *Id.* at 829. The procedural history of *Hein* is somewhat complex: On January 14, 1953, Hein filed his tax return for the taxable year 1952, claiming the dependency exemption and head-of-household status; then on March 5, 1953, he filed an amended return for 1952, claiming the status of an unmarried person; a week later, he filed a claim for a refund for 1952, again claiming head-of-household status. *Id.* at 828-29. In an attached statement, Hein noted that his “local revenue bureau” had informed him of the temporary absence exception under the head-of-household rules. *Id.* at 829. However, because Hein could not prove that his sister’s confinement was “of a temporary nature,” the local revenue bureau had advised him to “pay the tax of a single person and make a claim for a refund in anticipation of the clarification of the regulations.” *Id.* Although it is unknown whether Hein paid for such advice, the existence of an intermediary in Hein’s decision-making process is worth noting. See Stephen D. Holt, *Keeping It in Context: Earned Income Tax Credit Compliance and the Working Poor*, 6 CONN. PUB. INT. L. J. 183, 199-200 (2007).

57. *Hein*, 28 T.C. at 829; see also *supra* note 48.

58. *Hein*, 28 T.C. at 832.

59. *Id.* at 829. The Court explained:

None of the tests suggested in the committee reports and in the regulations deals specifically with illness; and in our opinion they were intended to be guides. . . . Rather, we think that in determining the principal place of abode, each case must be decided on its own particular facts and circumstances.

*Id.*

in the mental institution to “terminate her relationship to her preexisting home.”<sup>60</sup> Based on Hein’s statement in his claim for refund in which he asserted that “if my sister is ever able to leave [the mental institution] she will again live in my home,”<sup>61</sup> the court held that its own test was satisfied, and allowed Hein to claim head-of-household status.<sup>62</sup>

While the *Hein* court dealt with a claim of a “special circumstance” that fit into one of the categories specifically mentioned in the head-of-household regulations (i.e., illness), the Tax Court in *Prendergast v. Commissioner*<sup>63</sup> considered the application of the temporary absence exception to a situation which was not contemplated by the Treasury. In *Prendergast*, the Service denied head-of-household status to a taxpayer whose son had moved out of the taxpayer’s home during the year and into another home with some friends.<sup>64</sup> The court refused to extend the temporary absence exception to the taxpayer, noting that “this was not the type of temporary absence which Congress intended to allow.”<sup>65</sup> Citing *Hein*, the court considered the list of “special circumstances” in the regulation to be “merely a guide for deciding cases on a case-by-case basis.”<sup>66</sup> However, the court did not consider the appropriate test for the temporary absence exception to be the absence of intent to leave the home, as in *Hein*, but rather whether the absence was “due generally to necessitous reasons.”<sup>67</sup>

### 3. Service Acquiescence in *Hein v. Commissioner*

The Service acquiesced in the *Hein* decision in 1958, without comment.<sup>68</sup> Eight years later, the Service issued Revenue Ruling 66-28, in which it applied the temporary absence exception to the residency requirement under the dependency exemption regulations in circumstances similar to those in *Hein*.<sup>69</sup> As a general policy matter, Service acquiescence in an adverse Tax Court decision “does not necessarily mean acceptance and approval of any or all of the reasons assigned by the Court for its conclusions.”<sup>70</sup> However, the Service in Revenue Ruling 66-28 adopted the *Hein* court’s analysis in its determination, inquiring into the intent of the taxpayer and dependent to change the dependent’s principal place of abode, and noting that “[t]he possibility or probability that death might intervene before the dependent returns to the

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60. *Id.* at 835 (“The statute requires nothing more.”). The Court added: “[T]he true test is not whether the return may be prevented by an act of God, but rather whether there are indications that a new permanent habitation has been chosen.” *Id.*

61. *Id.* at 829.

62. *Id.* at 835.

63. 57 T.C. 475 (1972).

64. *Id.* at 476 (“The reason Murphy moved to the apartment in Seattle was to get away from Bothell for awhile, to try living on his own, and to enjoy a less restrained, more active social life.”).

65. *Id.* at 479.

66. *Id.* at 480 (citing *Hein*, 28 T.C. at 833); see also I.R.S. Serv. Ctr. Adv. 200002043 (Jan. 14, 2000).

67. *Prendergast*, 57 T.C. at 480. The Court acknowledged the flaw in its interpretation as “less than precise,” but justified it by adding, “the courts are able to decide on which side a particular case falls.” *Id.*

68. I.R.S. Announcement, 1958-2 C.B. 3.

69. Rev. Rul. 66-28, 1966-1 C.B. 31. The taxpayer was permitted to claim a dependency exemption for an unrelated elderly woman who, but for her indefinite confinement in a nursing home, would otherwise qualify as a dependent. *Id.*

70. I.R.S. Announcement 1958-2 C.B. 3.

taxpayer's household is not sufficient to make such absence permanent."<sup>71</sup> The Service affirmed its acquiescence in *Hein* in Service Center Advisory 200002043, in which it applied the temporary absence exception to the detention of the taxpayer's child in a juvenile facility pending trial, holding that the determinative issue "is whether there is any intent to change the principal place of abode."<sup>72</sup>

### III. THE *ROWE V. COMMISSIONER* DECISION

The facts leading up to the *Rowe v. Commissioner*<sup>73</sup> decision are fairly straightforward: Cynthia Rowe lived with her two children<sup>74</sup> throughout the beginning of 2002 until June 5, when Rowe was arrested in connection with the shooting death of her brother-in-law.<sup>75</sup> She remained incarcerated for the remainder of 2002, was convicted of murder in 2003, and was sentenced to life imprisonment at an Oregon correctional facility.<sup>76</sup> Prior to her arrest, Rowe provided support to her children with a combination of wages and government assistance, and continued to do so until July 2, 2002, when the State of Oregon took over the financial and medical support of the children.<sup>77</sup>

For the taxable year 2002, Rowe claimed head-of-household status, dependency exemptions for her two children, and an EITC on her tax return.<sup>78</sup> On the Schedule EIC that she included with her return,<sup>79</sup> Rowe stated that she lived with her children for more than half of 2002, but less than seven months.<sup>80</sup> Rowe received an EITC in the amount of \$1,070, but later received a deficiency notice from the Internal Revenue Service stating that she was ineligible for the EITC because she failed to meet the residency requirement under § 32(c)(3) with respect to her two children.<sup>81</sup>

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71. Rev. Rul. 66-28.

72. I.R.S. Serv. Ctr. Adv. 200002043 (Jan. 14, 2000).

73. 128 T.C. 13 (2007).

74. The plurality opinion states that Rowe lived with her children "first at a home on Marcum Lane in Eugene, Oregon, and then at the home of [her] mother-in-law." *Id.* at 14. Rowe's mother-in-law, Evelyn Rowe, passed away on April 27, 2002. *Obituaries*, THE REGISTER-GUARD (Eugene, Or.), May 4, 2002, available at <http://www.thefreelibrary.com/Obituaries.-a085503737> (last visited Apr. 15, 2008). Rowe was estranged from her husband, and the children's father, Charles Rowe, who did not live with them in his mother's home. Rebecca Nolan, *In-Law Held in Shooting Death*, THE REGISTER-GUARD (Eugene, Or.), June 6, 2002, available at <http://www.thefreelibrary.com/In-law+held+in+shooting+death.-a087178384> (last visited Apr. 15, 2008). However, after Rowe's arrest, Charles moved into his mother's home to care for the children. *Rowe*, 128 T.C. at 14.

75. Nolan, *supra* note 74.

76. *Rowe*, 128 T.C. at 14-15.

77. *Id.* at 14.

78. *Id.* at 15. The Court referred to the "EIC" ("Earned Income Credit") throughout the opinion, but numerous authorities refer to the "EITC" ("Earned Income Tax Credit"). This Note chooses the latter acronym to refer to the credit.

79. Schedule EIC asks for information relating to the qualifying children of the taxpayer, including the number of months that the child(ren) lived with the taxpayer during the taxable year. I.R.S. Schedule EIC (2008), <http://www.irs.gov/pub/irs-pdf/fl040sei.pdf>.

80. *Rowe*, 128 T.C. at 15.

81. *Id.* The Court mentioned in a footnote that the Service also disputed Rowe's eligibility for head-of-household status and dependency exemptions for her two children, but later relented on the issue of the dependency exemptions. *Id.* at 15 n.2.

Rowe refused to pay the deficiency, and instead appealed the deficiency to the Tax Court. In her petition to the Tax Court, Rowe argued that although her arrest on June 5 caused her physically to be away from her mother-in-law's home (the home of her children) for the remainder of 2002, her "residence" remained her mother-in-law's home for the rest of year.<sup>82</sup> Rowe asserted that her incarceration constituted a "temporary absence" that did not count against her for the purpose of determining whether she and her children satisfied the residency requirement under § 32(c)(3).<sup>83</sup> Neither party in the case submitted briefs, so the Tax Court was on its own to determine the legal framework on which to base its decision.<sup>84</sup> As a result, the sixteen judges who participated in the case were scattered across four separate published opinions.<sup>85</sup> Although a majority of the judges agreed that Rowe should have been allowed the EITC, they were all over the map of regulations, Revenue Rulings, legislative history, and case law in determining how the result could be justified.

The court, in the majority opinion written by Judge Kroupa, began its analysis in § 32(c)(3), which defined "qualifying child" for the purposes of claiming the EITC.<sup>86</sup> It quickly discovered that "[t]he phrase 'same principal place of abode' [was] not defined in section 32 or the regulations under that section."<sup>87</sup> Specifically, § 32(c)(3) did not provide an exception to the residency requirement for "temporary absences," so the court looked to the legislative history of § 32 for the authority to apply the residency requirement for claiming head-of-household status under § 2(b) to the EITC.<sup>88</sup> Finally, the court examined the regulations under the head-of-household provisions to find the exception for "temporary absences."<sup>89</sup> The court acknowledged that the regulations did not include "[a]bsence due to jail confinement after an arrest," but argued that "Congress intended for similar, not identical, rules to apply to

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82. *Id.* at 15-16.

83. *Id.* at 16.

84. *Id.* at 24 (Gale, J., concurring). Judge Gale acknowledged the lack of argument by the Commissioner other than the deficiency notice itself:

Respondent does not even address the "temporary absence due to special circumstances" provision of the head of household regulations, let alone the reasonable assumption of return clause therein . . . . Thus I do not know whether respondent's position is that a parent's pretrial incarceration does not constitute a "temporary absence due to special circumstances" . . . or that petitioner's incarceration, though concededly a special circumstance, is nonetheless disqualifying because it was not reasonable to assume that petitioner would return.

*Id.* at 25.

85. Judge Kroupa wrote the opinion of the Court, *id.* at 14, Judges Gale and Goeke each filed concurring opinions, *id.* at 20, 27, and Judge Halpern wrote for the dissent, *id.* at 28.

86. *Id.* at 15. Rowe claimed the EITC in 2002, *id.* at 13, two years prior to the enactment of the Working Families Tax Relief Act of 2004, which among other things provided a uniform definition of a "qualifying child" under § 152 of the Internal Revenue Code. Working Families Tax Relief Act of 2004, Pub. L. No. 108-311, § 201, 118 Stat. 1166, 1170. The Act also extended the uniform definition of a qualifying child to the requirements for head-of-household filing status, § 202, the dependent care credit, § 203, the child tax credit, § 204, and the EITC, § 205. However, prior to the enactment of the uniform definition, each section defined a "qualifying child" independently. See discussion *supra* Part II.B.

87. *Rowe*, 128 T.C. at 16.

88. *Id.* (citing H.R. REP. NO. 101-964, at 1037 (1990) (Conf. Rep.), as reprinted in 1991-2 C.B. 560, 564).

89. *Id.* at 17 (citing Treas. Reg. § 1.2-2(c)(1) (1971)).

determine whether the residency requirement is met for EIC purposes.”<sup>90</sup> The court also cited *Prendergast*, noting that the list of “special circumstances” in § 2(b) is not exhaustive.<sup>91</sup> The court then concluded that the absence of “an individual confined in jail after an arrest but before conviction [such as Rowe]” was sufficiently similar to the other examples of temporary absences listed in the head-of-household regulations because it was “a type of absence of a necessitous variety.”<sup>92</sup>

The court did not end its inquiry there, however. Next, it considered whether, despite her incarceration, it was reasonable to assume that Rowe would return to her mother-in-law’s home.<sup>93</sup> However, the court combined the reasonable-assumption-of-return test with the factors established in *Hein*,<sup>94</sup> maintaining that the reasonable-assumption-of-return test would be met if the taxpayer intended to return home and there was no evidence that the taxpayer had chosen a new home.<sup>95</sup> In the instant case, the court considered the relevant facts to be that Rowe’s criminal case was still pending at the end of 2002, that there were “no indications in the record that [she] intended to choose a new home,” and that she had referred to her mother-in-law’s home as “‘my home’” in court documents.<sup>96</sup> On these facts, the court concluded that it was reasonable to assume that Rowe would return home, even though she remained in jail through the end of the year at issue, and held that “her temporary absence due to jail confinement after her arrest but before conviction does not disqualify her from eligibility for the EIC for 2002.”<sup>97</sup>

Only four other judges on the court agreed with Judge Kroupa’s analysis,<sup>98</sup> which employed a mix of the reasonable-assumption-of-return standard under the head-of-household regulations and the factors establishing a taxpayer’s intent to return home under *Hein*.<sup>99</sup> On the contrary, Judge Gale did not consider the reasonable-assumption-

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90. *Id.* (citing H.R. REP. NO. 101-964, at 1037).

91. *Id.* at 17 (citing *Prendergast v. Comm’r*, 57 T.C. 475, 480 (1972)).

92. *Id.* at 17-18.

93. *Id.* (citing Treas. Reg. § 1.2-2(c)(1)).

94. 28 T.C. 826 (1957). In *Hein*, the taxpayer had claimed head-of-household status and a dependency exemption for his sister, although she had been confined in a mental health institution for the previous six years. *Id.* at 828. The Commissioner had issued a deficiency to the taxpayer, claiming that although the taxpayer had provided over half of his sister’s support, he had not “established that the absence of [his] dependent sister from the household [was] temporary, and that [he was] maintaining such household anticipating her return.” *Id.* at 829. The Tax Court held that the taxpayer was entitled to head-of-household status, despite his sister’s “age and her slight chance for recovery,” because neither the taxpayer nor his sister “ever intended that such confinement should terminate her relationship to her preexisting home.” *Id.* at 835.

95. *Rowe*, 128 T.C. at 18-19 (citing *Hein*, 28 T.C. at 834-35).

96. *Id.* at 19.

97. *Id.* The Court did note the “extraordinarily narrow” application of its holding to inmates who have claimed the EITC based on income earned prior to incarceration. *Id.* at 20 (citing I.R.C. § 32(c)(2)(B)(iv) (2006) (providing that for the purposes determining taxpayer’s eligibility for the EITC, “no amount received for services provided by an individual while the individual is an inmate at a penal institution shall be taken into account”)).

98. Judges Cohen, Swift, Wells, and Vasquez agreed with the majority. *Id.* at 20.

99. *Hein* was decided under a predecessor of the current head-of-household regulations, which were then located at § 39.12-4(c) of Regulation 118. 28 T.C. at 832. The earlier regulations contained essentially the same language as reprinted. *See supra* note 7.

of-return standard to be relevant to the analysis of Rowe's case.<sup>100</sup> Rather, he looked to Revenue Ruling 66-28,<sup>101</sup> which he argued "eschewed reliance on any reasonable-assumption-of-return standard in the case of absences due to extended illness and instead emphasized the absence of intent on the part of the taxpayer or dependent to change the dependent's place of abode."<sup>102</sup>

Additionally, Judge Gale noted that the Service had issued Service Center Advice 200002043, which concluded that a child's "detention in a juvenile facility pending trial" could be considered a temporary absence for the purpose of determining whether a parent claiming the EITC satisfies the residency test under § 32(c)(3), as long as there was no intent on part of either child or parent to change the child's principal place of abode.<sup>103</sup> Acknowledging that such informal guidance was not binding on the Commissioner, he nevertheless saw it as evidence that the Commissioner had contemplated the application of the temporary absence exception to "an incarceration scenario."<sup>104</sup> Therefore, Judge Gale contended, the appropriate test for evaluating whether Rowe's jail confinement constituted a temporary absence was not whether it was reasonable to assume that she would return home, but whether she intended to change her principal place of abode (which Judge Gale concluded she did not).<sup>105</sup>

The second concurring opinion, written by Judge Goeke, offered yet another interpretation of the temporary absence analysis that he hoped would "emphasize the very limited nature" of the court's holding: "[W]here a taxpayer is involuntarily removed from her principal place of abode and has not manifested any intent to change that abode, her absence shall be considered temporary for purposes of eligibility for the earned income credit."<sup>106</sup> Although Judge Goeke, unlike Judge Gale, did not believe that the reasonable-assumption-of-return test under the head-of-household regulations had been abolished by subsequent case law and Revenue Rulings,<sup>107</sup> he considered the test to be inappropriate as applied to Rowe's incarceration, which he likened to the extended confinement of the elderly sister in *Hein*.<sup>108</sup>

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100. *Rowe*, 128 T.C. at 20-26 (Gale, J., concurring).

101. Rev. Rul. 66-28, 1966-1 C.B. 31. The Revenue Ruling involved facts similar to those in *Hein*. The Service applied the *Hein* court's interpretation of the temporary absence exception under head-of-household regulations in holding that an elderly woman "indefinitely confined to a nursing home" could be considered to be temporarily absent from the her and the (unrelated) taxpayer's home, thus allowing the taxpayer to claim her as a dependent under § 152(a)(9). *Id.* ("The possibility or probability that death might intervene before the dependent returns to the taxpayer's household is not sufficient to make such absence permanent.").

102. *Rowe*, 128 T.C. at 22. Moreover, Judge Gale noted that ever since the ruling was issued, Congress has treated "the principles of the ruling as equally applicable for dependency exemption, earned income credit, and head of household purposes." *Id.* at 24 (citing H.R. REP. NO. 108-696, at 58 (2004) (Conf. Rep.), as reprinted in 2004 U.S.C.A.N. 1029, 1052).

103. *Id.* at 25 (citing I.R.S. Serv. Ctr. Adv. 200002043 (Jan. 14, 2000)).

104. *Id.*

105. *Id.* at 26.

106. *Id.* at 27 (Goeke, J., concurring).

107. *Id.* ("We do not adopt a general intent test that would be inconsistent with the reasonableness of return test of section 1.2-2(c)(1) [of the income tax regulations].").

108. *Id.* at 28 ("I see the petitioner's absence in this case as analogous to a departure caused by serious illness [as in *Hein*] and not a circumstance in which it is appropriate to apply the reasonableness of return test.").

In dissent, Judge Halpern, joined by five other judges, opposed the rejection of the reasonable-assumption-of-return test by the majority and concurring opinions; specifically, Judge Halpern disagreed with the notion that subsequent case law and Service guidance definitively overruled the regulations.<sup>109</sup> He did not dispute the determination by the other opinions that jail confinement was a category appropriately within the meaning of temporary absence in the head-of-household regulations.<sup>110</sup> However, he maintained that the reasonable-assumption-of-return test presented a question of fact, and thus was necessary in situations where it was impossible to know whether the taxpayer's absence would be temporary or not.<sup>111</sup> Therefore, he argued, Rowe should have been forced to prove "by a preponderance of the evidence that it [was] reasonable to assume that she [would] return to the household," which she failed to do at trial.<sup>112</sup>

Judge Halpern was also very critical of the legal analysis employed by each of the other three opinions. Noting that the regulation containing the reasonable-assumption-of-return test, Treas. Reg. § 1.2-2(c)(1), had "the force and effect of law unless it is unreasonable under the statute," he objected to the fact that none of the opinions actually challenged the validity of the regulation under the statute.<sup>113</sup> None of the opinions, in Judge Halpern's view, adequately reconciled the language of the reasonable-assumption-of-return standard under Treas. Reg. § 1.2-2(c)(1) with the other sources of authority that the judges employed, particularly *Hein*, Revenue Ruling 66-28, and Service Center Advice 200002043.<sup>114</sup>

Finally, Judge Halpern drew attention to one policy implication of the court's holding: because Rowe was allowed to take the EITC by taking advantage of the

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109. *Id.* at 33 (Halpern, J., dissenting) ("I am not prepared to conclude that the Commissioner has, sub silentio, amended the Secretary's regulations.").

110. *Id.* at 30 ("I agree with the principal opinion that the list of special circumstances in section 1.2-2(c)(1), Income Tax Regs., is not exclusive.").

111. *Id.* at 30-31.

112. *Id.* at 34. Judge Halpern was the only judge who argued that the particular criminal charges against Rowe were relevant to the reasonable-assumption-of-return test. *Id.* at 31. To illustrate his point, he compared a charge of child abuse to a charge of theft, noting that while it would be unreasonable to assume that the person accused of child abuse would return to the children's home, it would be reasonable to assume that the person accused of theft would return home. *Id.*

The court specifically declined to inquire into the strength of the murder charge against Rowe, adding, "[w]e shall not assess the merits of a criminal case to determine whether a taxpayer is eligible for the EIC." *Id.* at 19 (majority opinion). The court reasoned: "Such an analysis would require us to assess the strengths and weaknesses of the criminal case against [Rowe] . . . . These inquiries are best left to the criminal process to address." *Id.* Likewise, Judge Gale argued that just as it would be "unseemly" for the tax administrator to assess a taxpayer or dependent's medical prognosis under the reasonable-assumption-of-return standard, it would be equally inappropriate for the tax administrator "to speculate about the outcome of the criminal process in a manner that may be inconsistent with the presumption of innocence." *Id.* at 26 (Gale, J., concurring).

113. *Id.* at 28-29 (Halpern, J., dissenting). Judge Halpern also lamented the lack of briefing from either party on the issue, concluding: "This case presents too many questions for disposition without briefing by the parties." *Id.* at 36.

114. *Id.* at 32-33. Specifically, he criticized the other judges' convenient reading of these sources, coupled with the lack of briefs: "[A]re we really prepared to interpret a ruling that, it seems by stealth, overrules a regulation without asking for the Commissioner's position and without deciding for ourselves whether the regulation is valid?" *Id.* at 36.



temporary absence exception, this left the children's father, who had *in fact* resided in his mother's home with the children for over half of the year following Rowe's arrest, unable to claim the credit under the tie-breaking rule of § 32.<sup>115</sup> None of the other judges had contemplated this effect of the court's holding.

#### IV. ANALYSIS

##### *A. The Rowe v. Commissioner Decision: Another Link in the Chain of Flawed Analyses*

The *Rowe* decision was flawed in three major respects. First, the court completely overlooked the fact that by awarding the EITC to Rowe, it was simultaneously disallowing the credit to the children's father, who, under the plain words of the statute, passed all three requirements without question.<sup>116</sup> It is unknown from the facts provided in the opinions whether Charles Rowe actually claimed the EITC for the year 2002, but if he did, the EITC rightfully belonged to him under the tie-breaking rules of the former § 32(c)(1)(C)(ii) as he resided with the children for the longest period of time during the year.<sup>117</sup> The court did not discuss whether the temporary absence exception would still be applicable to satisfy the residency requirement if the other parent, or someone else, were entitled to the EITC without resorting to the exception. Regardless of whether Charles in fact claimed the EITC in the same year as Rowe, the court should have considered this a threshold issue as it could have avoided this case entirely if it found that the credit rightfully belonged to someone other than Rowe.

115. *Id.* (citing I.R.C. § 32(c)(1)(C)(ii)(I) (Supp. III 2003) (repealed 2004)); *see also* discussion *supra* Part II.B. Judge Halpern added: "If we are to be influenced by sympathy for petitioner in light of what we discern to be the policy behind section 32, we should consider that, to the extent we have crafted a rule of law, it may have unintended consequences for other taxpayers deserving of our sympathy." *Rowe*, 128 T.C. at 36.

116. Only Judge Halpern noticed this glaring omission. *See supra* note 115 and accompanying text.

117. I.R.C. § 32(c)(1)(C)(ii) (Supp. III 2003) (repealed 2004). Former § 32(c)(1)(C) read:

(C) 2 or more claiming qualifying child.

(i) In general

Except as provided in clause (ii), if (but for this paragraph) an individual may be claimed, and is claimed, as a qualifying child by 2 or more taxpayers for a taxable year beginning in the same calendar year, such individual shall be treated as the qualifying child of the taxpayer who is—

(I) a parent of the individual, or

(II) if subclause (I) does not apply, the taxpayer with the highest adjusted gross income for such taxable year.

(ii) More than 1 claiming credit

If the parents claiming the credit with respect to any qualifying child do not file a joint return together, such child shall be treated as the qualifying child of—

(I) the parent with whom the child resided for the longest period of time during the taxable year, or

(II) if the child resides with both parents for the same amount of time during such taxable year, the parent with the highest adjusted gross income.

*Id.* Under the former rule, both parents must have actually claimed the EITC for § 32(c)(1)(C)(ii) to have applied. *Id.*; *see also* I.R.C. § 152(c)(4)(B) (2006) (applying to "[m]ore than [one] parent claiming qualifying child").

Second, the *Rowe* court incorrectly interpreted the framework of the temporary absence exception and improperly applied the exception to the taxpayer's case. The flaws in the court's analysis began with its conclusion that the taxpayer's incarceration was sufficiently similar to the other examples of temporary absences listed in the head-of-household regulations because it was "a type of absence that is of a necessitous variety."<sup>118</sup> The court extended the theory put forth by the *Prendergast* court—that what makes an absence temporary or permanent is whether the absence is "due generally to necessitous reasons."<sup>119</sup> However, the *Prendergast* court itself admitted that this interpretation of what was meant by temporary absence was "less than precise."<sup>120</sup>

It is not difficult to find the error in the *Prendergast* court's, and now the *Rowe* court's, interpretation of the regulation. A cursory look at the regulation's list of special circumstances—"illness, education, business, vacation, military service, or a custody agreement under which a child or stepchild is absent for less than 6 months in the taxable year of the taxpayer"<sup>121</sup>—reveals that this "necessity test" does not work. For example, it is a rare occurrence indeed that a "vacation" would be considered a "necessitous" absence. Yet, under the language of the regulation, a vacation (appropriately) qualifies as a "temporary absence due to special circumstances." As for the other circumstances listed—excepting, of course, military service—the necessity of any of those absences could be debated depending on the particular set of facts and circumstances; yet, all are included within the definition of "temporary absence due to special circumstances" without qualification as to necessity. This Note does not mean to suggest that pretrial incarceration should never be considered a temporary absence due to special circumstances under the regulation; rather, this Note questions the "necessity" justification for including incarceration within the temporary absence exception which is perpetuated by the *Rowe* decision.

Third, the *Rowe* court incorrectly applied the reasonable-assumption-of-return test under Treas. Reg. § 1.2-2(c)(1) to Rowe's incarceration on murder charges. The court claimed that it was applying the reasonable-assumption-of-return test, but rather than making a determination based on the facts and circumstances (e.g., the fact that Rowe was in prison awaiting a murder trial), the court instead concluded that it was reasonable to assume that Rowe would return home because she "intended" to do so. In fact, the only piece of "evidence" considered by the court in applying the reasonable-assumption-of-return test was the fact that Rowe had referred to her mother-in-law's home as "my home" in court documents.<sup>122</sup>

The source of the crack in the court's analytical foundation can be traced back to *Hein*. The *Hein* decision fundamentally misconstrued the temporary absence exception and set off a chain of interpretation that has essentially transformed the relevant inquiry from one of "reasonableness" into one of "intent."<sup>123</sup> By applying *Hein*'s "intent" test,

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118. *Rowe*, 128 T.C. at 17.

119. *Prendergast*, 57 T.C. at 480.

120. *Id.*; see also *supra* note 67.

121. Treas. Reg. § 1.2-2(c)(1) (2007).

122. *Rowe*, 128 T.C. at 19.

123. *Hein*, 28 T.C. at 835. Interestingly, the *Hein* Court expressly eschewed the reasonable-assumption-of-return test as a "misapplication of the congressional intent." *Id.*

the *Rowe* court blurred together two different lines of reasoning—one based on an objective analysis of facts and circumstances,<sup>124</sup> and the other based on a subjective inquiry into intent—that are fundamentally at odds. Simply because a person “intends” to return home does not mean that it is “reasonable to assume” that she will do so. There are plenty of factors that could render this assumption unreasonable, despite the person’s intentions. If these factors are to be considered irrelevant if a person merely expresses an intention to return, then the Treasury added the reasonable-assumption-of-return test to Treas. Reg. § 1.2-2(c)(1) for no apparent reason.

The Service is equally at fault for perpetuating the fundamentally defective application of the temporary absence exception by acquiescing in the *Hein* analysis in Revenue Ruling 66-20, and continuing its acquiescence in Service Center Advice 200002043. The Service’s complicity in the contortion of Treas. Reg. § 1.2-2(c)(1) is particularly perplexing given its recent zeal to rein in noncompliance with the residency requirement of the EITC through its recent pre-certification program.<sup>125</sup> If the Service is so concerned with overpaying EITC claims due to inaccurate residency statements, then why has it left open an avenue through which a claimant could avoid the residency requirement entirely? Where most EITC claimants must painstakingly document the time they spent in the child’s principal place of abode in case of an audit—or until recently, in order to receive the credit in the first place—those who claim a temporary absence are held to an absurdly low standard.

Of course, the *Rowe* court’s unwillingness to assess the merits of the criminal case against Rowe in deciding whether it was reasonable to assume that she would eventually return home is understandable and appropriate.<sup>126</sup> However, that does not mean that the circumstances surrounding her absence from the children’s home were irrelevant to the analysis. Because Rowe was the one asserting that she should be exempted from the residency requirement—a requirement to which all other taxpayers wishing to claim the EITC are subject, and for which some have been obligated to provide documentation prior to receiving the credit<sup>127</sup>—she should have had the burden to prove that the temporary exception applied to her. An integral element of this burden is proving that it was reasonable to assume that she would return to her children’s home, an element for which Rowe offered no evidence at all. The most

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124. *Rowe*, 128 T.C. at 34 (Halpern, J., dissenting). As the case was presented to the court without briefs or argument, Judge Halpern conducted the reasonable-assumption-of-return test to the letter of § 1.2-2(c)(1):

At the end of 2002, there was insufficient information to say with certainty whether petitioner’s absence from the household on account of her arrest and incarceration was temporary (and therefore an excusable special circumstance) or permanent (and therefore inexcusable, whether a special circumstance or not).

. . . .

The reasonable-expectation-of-return test presents a question of fact. Petitioner bears the burden of proving by a preponderance of the evidence that it is reasonable to assume that she will return to the household. . . . [P]etitioner has failed to produce any evidence that it is reasonable to assume that she will return.

*Id.* at 30, 34.

125. See *supra* Part II.C for a discussion of the Service’s pilot certification program.

126. See *supra* note 102.

127. See *supra* Part II.C.

significant error by the Tax Court in the *Rowe* decision is that it never held the petitioner to this burden of proof.

*B. Potential for Abuse Under the Current Interpretation of the  
Temporary Absence Exception*

The fundamental flaw in the “intent” test—instituted by *Hein*, acquiesced in by the Service, and now perpetuated by *Rowe*—is that it expands the temporary absence exception far beyond its regulatory language and has virtually limitless possibilities for abuse. The result is that the exception effectively swallows the rule that in order to claim the maximum EITC, the taxpayer must actually live with one or more qualifying children. Instead, the rule has become that the taxpayer must start out living with one or more qualifying children, but may leave the home for an indefinite period of time, as long as the taxpayer intends—at some point, possibly—to return. Moreover, as the exception expands, other potential EITC claimants—those who actually live with and care for the children while the taxpayer is away—are excluded from the benefit, despite meeting all of the requirements under the statute.<sup>128</sup> Of course, the temporary absences that are specifically listed in Treas. Reg. § 1.2-2(c)(1) as special circumstances are valid excuses that should be honored if the reasonable-assumption-of-return test is met. However, if the regulation is merely “a guide,” as the *Rowe* court indicates,<sup>129</sup> and the applicability of the temporary absence exception is limited only by the taxpayer’s intent, then the exception ceases to be an exercise of regulatory grace and instead becomes an outright abrogation of the statutory residency requirement for claiming the EITC.

Consider the implications of the intent test in light of Leslie Book’s theory that the EITC contains “structural incentives” for taxpayers to finagle eligibility under the residency requirement.<sup>130</sup> If meeting the residency requirement is a problem for a potential EITC claimant, rather than risk perjury by misstating the amount of time spent living in the child’s home, a claimant could simply claim a temporary absence due to special circumstances.<sup>131</sup> Because the regulation fails to specify exactly what makes an absence “temporary” or what makes circumstances “special,” the possibility for exploitation is virtually infinite. Under the present interpretation of the regulation, it does not matter how unreasonable the possibility is that the claimant would eventually live with the child, as long as the claimant maintains an “intention” to do so.

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128. See *supra* Part II.B for a discussion of the tiebreaker rules under the EITC.

129. *Rowe*, 128 T.C. at 17.

130. Book, *supra* note 32, at 1171.

131. Of course, as Book clarifies in her discussion of the “structural incentive” theory, this Note does not insinuate that potential EITC claimants are more likely to cheat the tax system than other taxpayers. In fact, if argued correctly, the type of claim under the temporary absence exception that this Note suggests is possible would be perfectly legitimate under the current interpretation of the regulation. As Judge Learned Hand stated, and as every corporate taxation textbook is sure to mention: “Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one’s taxes.” *Helvering v. Gregory*, 69 F.2d 809, 810 (2d Cir. 1934).

*C. Recommendation for Future Analysis of Temporary Absence Exception Claims*

Consistent with the intent of Congress to target the EITC to those who need it most, the temporary absence exception to the residency requirement should be narrowly construed. When faced with a claim of the temporary absence exception to the residency requirement of the EITC, a court should first inquire whether another taxpayer is entitled to the credit and, if necessary, apply the tie-breaking rules under § 152(c)(4).<sup>132</sup> If another taxpayer meets the traditional requirements for claiming the qualifying child under the statute, including the residency test, there should be no need to inquire further into the head-of-household regulations to apply the temporary absence exception to someone who does not meet those traditional requirements. Next, the court should decide whether the absence claimed is a “temporary absence due to special circumstances” within the meaning of Treas. Reg. § 1.2-2(c)(1) of the regulations. If the absence claimed is one that is specifically listed in the regulation, the court’s job is significantly easier. If it is not listed, however, then the court should determine based on the relevant facts and circumstances whether the absence appropriately fits within the types of absences sanctioned in the regulation. The determination should not turn on whether the absence was necessary, but rather, whether the absence was “temporary” and “due to special circumstances.” Finally, the court should determine whether it was reasonable to assume that the taxpayer (or individual being claimed as a qualifying child) would return home after the absence. Again, the determination should be based on all relevant facts and circumstances surrounding the absence, not simply the taxpayer’s intent. As each of these steps requires an objective analysis of facts and circumstances, and as the effect of the temporary absence exception is to award the EITC to a taxpayer who does not meet the strict requirements under the statute, the taxpayer should have the burden of proving that the exception should apply.

## V. CONCLUSION

It is no wonder that the residency requirement under the EITC, so simple on its face, has wreaked so much havoc on all three branches of government as well as on low income taxpayers. In trying to create a tax benefit that is sufficiently targeted, yet accounts for the realities of family relationships,<sup>133</sup> Congress, the Internal Revenue Service, and the Tax Court have instead created a whirlwind of confusion that has spiraled out of control. Unfortunately, the *Rowe* decision only adds to the disorder by further relaxing the standard for claiming the temporary absence exception to the residency requirement. The *Rowe* court is not to blame for the flaws of the residency requirement, which stem from burdensome compliance and enforcement procedures, vague regulatory drafting, and inconsistent judicial interpretation of those regulations beginning with *Hein*. However, the *Rowe* court is ultimately responsible for failing to recognize how badly the interpretation of the temporary absence exception has

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132. See *supra* Part II.B.

133. See NICHOLAS JOHNSON, ET AL., CENTER ON BUDGET AND POLICY PRIORITIES, STATE EARNED INCOME TAX CREDITS AND THE “OVERPAYMENTS” ISSUE 2 (2007).

distorted the purpose of the residency requirement of the EITC, and for missing an opportunity to bring the analysis back on track.

To avoid another adverse decision such as *Rowe*, the Service should reevaluate its acquiescence in the *Hein* analysis, overturn the misguidance of Revenue Ruling 66-28, and issue a new ruling which adheres to the plain language of the regulation and requires a taxpayer to establish through facts and circumstances, rather than intent, that the temporary absence exception should apply. However, the Treasury Department could also rectify this conundrum by issuing a new regulation—specifically tailored to the EITC—which adequately defines the limits of the “temporary absence due to special circumstances” exception once and for all.